85-665

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PLEASANT VIEW ELEMENTARY SCHOOL PTA,

PETITIONER,

v.

GROUP I DEFENDANTS

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Wilbur H. Friedman, Jr.
Room 863
1717 Pennsylvania Ave.,
N.W.
Washington, D.C. 20570
(202) 254-9329

QUESTIONS PRESENTED

Whether the lower federal courts erred by refusing to consider PTA's pendent state claims against the Montgomery County Board of Education on the stated grounds that the case had not been tried and that the federal due process and equal protection claims should be dismissed for failure to state a claim upon which relief can be granted, where: a) PTA's pendent state claims are based, almost in their entirety, upon an administrative record already developed before the Maryland State Board of Education; b) The lower courts' decision means that the state claims can never be heard on their merits, because the state court system, on procedural grounds, refused to consider the merits of PTA's state claims; c) The state court system, contrary to its established rule permitting

liberal amendment of complaints, denied PTA leave to amend to some other form of action; d) The lower federal courts improperly dismissed PTA's due process claims, because they failed to subject PTA's claims to a Mathews-Eldridge cost benefit analysis; e) More particularly, the lower federal courts rejected PTA's due process claim that PTA was entitled to a statement of reasons why the County Board closed the precise schools it closed; f) The lower federal courts' disposition of PTA's equal protection claims, on a Rule 12(b)(6) motion, was improper both because the lower courts were not entitled to conclude, without examining the underlying record herein, that PTA could establish no set of facts in support of its claim that would entitle PTA to relief, and also because it was premature in that the County Board

had not provided reasons why it closed the particular schools it closed.

2. Whether the lower federal courts erred by failing to consider PTA's pendent state claims against the Maryland State Board of Education defendants on the grounds set forth above, where: a) As noted above, PTA's pendent state claims are based on a record already in being; b) Inasmuch as the state courts have denied PTA access for the purpose of establishing the merits of the state claims, the lower courts' decision means that the state claims will never be considered; c) PTA has proposed an accommodation of its First, Fifth, and Fourteenth Amendment rights to have the state claims heard and the 11th Amendment immunity of the State, namely that all disputed issues of law be referred to the Maryland Court of Appeals under Mary-

land's Certification of Questions of Law Act, and that procedure is in fact a reasonable accommodation of the conflicting constitutional rights; d) PTA's complaint herein alleged that the State Board violated a number of well accepted requirements of administrative and constitutional law, all with an object of condoning and covering up the actions of the County Board; and e) The lower federal courts performed no Mathews-Eldridge analysis of PTA's due process claims and summarily rejected PTA's equal protection claims.

3. Whether PTA's above-described due process and equal protection federal constitutional claims are meritorious.

PARTIES TO THE PROCEEDING

Other parties, in addition to those named in the caption are: Group 1 Defendants, Former Members of the Board of

Education of Montgomery County, Maryland: Carole F. Wallace and Eleanor D. Zappone and Joseph R. Barse and Dr. J. Edward Andrews, Former Superintendent, Montgomery County Public Schools, and Elizabeth W. Spencer and Suzanne Peyser, Dr. Marian L. Greenblatt and Blair G. Ewing and Group 2 Defendants, Current Members of the Board of Education of Montgomery County: Suzanne Peyser, Dr. Marian L. Greenblatt, Blair G. Ewing, Dr. James Cronin, Marilyn Praisner, Odessa Shannon, Dr. Robert Shoenberg, and Dr. Wilmer Cody, Current Superintendent, Montgomery County Public Schools and Group 3 Defendants, Members of Montgomery County Council and Montgomery County Executive: Rose Crenca, Scott Fosler, Esther Gelman, Michael Gudis, William Hanna, Neal Potter, David Scull and Charles W. Gilchrist, Montgomery County

Executive and Group 4 Defendants, Former Members of Maryland State Board of Education: G. George Asaki, May T. Bolt, Mary Elizabeth Ellis, Verna T. Fletcher, Joanne T. Goldsmith, Rosetta G. Kerr, Albertine T. Lancaster, Frederick Schoenbrodt, Dr. David W. Hornbeck, State Superintendent of Schools and Lawrence A. Miller and Group 5 Defendants, Current Members of Maryland State Board of Education: G. George Asaki, May T. Bolt, Mary Elizabeth Ellis, Verna T. Fletcher, Joanne T. Goldsmith, Rosetta G. Kerr, Albertine T. Lancaster, Frederick Schoenbrodt, Dr. David W. Hornbeck and Herbert Fishpaw. The other appellants below were Myra Freer and Wilbur H. Friedman, on behalf of themselves and their children.

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IN THE SUPREME COURT OF THE UNITED STATES
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No.

PLEASANT VIEW ELEMENTARY SCHOOL PTA,

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GROUP 1 DEFENDANTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pleasant View Elementary School PTA, by counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals and its order denying PTA's petition for rehearing and suggestion for rehearing in banc (App. A), are not yet reported. The opinion of the Maryland State Board of Education (excerpt, consisting of all portions relevant to Pleasant View,

App. B) is reported at 2 Op. MBSE 630. The opinions of the circuit court for Montgomery County, Maryland (App. C), Maryland's court of special appeals (App. D), the denial of certiorari by Maryland's court of appeals (App. E), the opinion of the United States district court (App. F), and the district court's memorandum and order denying emergency relief pending appeal (App. G) are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1985, and a timely petition for rehearing was denied on July 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.1.

STATEMENT

This 42 U.S.C. Sec. 1983 case involves approximately 28 closures of public schools in Montgomery County, Maryland.

The Court of Appeals affirmed a decision of the District Court granting a Rule 12(b)(6) motion to dismiss PTA's constitutional claims for failure to state a claim upon which relief can be granted, and denied PTA's pendent state claims on the grounds that the case had not yet been tried. The case was decided without reference to the record developed before the Maryland State Board of Education (herein, the State Board) and before the state courts. However, some of the evidence--the procedures adopted by the State Board and the Montgomery County Board of Education (the Local Board), and the decisions of the State Board and the state courts--was before the federal courts.

A. Rulemaking by the State and Local Boards; Closure Actions by the Local Board.

On May 27, 1981, the State Board adopted Resolution 1981-29,[1/] which in relevant part requires the Local Board to develop and implement regulations that govern the closing of schools in Montgomery County, requires the regulations to "provide at a minimum for adequate notice and an opportunity for citizen input," and further provides that the State Board will accept requests for hearings, i.e. appeals, if the requests allege with sufficient specificity that (a) the Local Board substantially deviated from its own rules or (b) the result of the school closing would have a constitutionally impermissible effect on students. This resolution, duly adopted

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1/ Resolution 1981-29 is set forth in Legal Fund Representative Committee, 2 Op. MSBE 370, at 371 (1981) and in the Joint Appendix filed with the Court of Appeals, JA-21-21a.

and published, has the force and effect of law.[2/] (Complaint, ¶¶ 1.21, 1.4)

In May 1979, the Local Board suspended a former school closing policy which in effect conferred complete power on the Local Board to close schools. In March 1981, the Local Board adopted its Long Range Education Facilities Policy (the Long Range Policy) which is universally recognized as compliance with State Board resolution 1981-29, but does not contain the language of its predecessor which confers complete power on the Local Board. (Complaint, ¶¶ 2.2 through 2.5)

Section 1 of the Long Range Policy, "Condition," recites in relevant part that enrollment in Montgomery County

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2/ Md. Education Article, Sec. 2-205(C): "(1) The State Board shall adopt bylaws, rules and regulations for the administration of the public schools. (2) These bylaws, rules and regulations have the force of law when adopted and published."

Public Schools has decreased from 126,000 students to 100,000, school populations have shifted location, and it has become increasingly difficult to provide high quality education at reasonable cost. "Efforts to address these problems with action, however, were met with public resistance in many cases. To resolve these difficulties, the [Local] Board enlisted the aid [of various citizen groups]...to study a...preliminary countywide comprehensive facilities plan.... [Such a plan] is essential for the [Local] Board to meet demands of the State Interagency Committee and the Montgomery County Council for a comprehensive facilities plan in order to qualify for capital funds..."[3/]

Section II ("Policy"), A ("Purpose"), 1 ("Goals") recites that among the goals of

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3/ JA-18.

the Policy are: "...to set forth criteria for the solution of problems caused by changing enrollment...." [T]his policy establishes a continuing process and outlines the steps to be taken from the time a school...is initially identified for change until the [Local] Board makes its final decision. [A]...goal is to improve public understanding of the process by which facilities recommendations and decisions are made..."4/

Section II,A,2 ("Principles"),g recites that "...The criteria and guidelines set forth in the Process section of this policy will direct the planning and decision-making process on educational facilities. The following four screening criteria are to be applied consistently to all schools in the county: minimum

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4/ Ibid.; Complaint, ¶¶ 2.53 through 2.534.

enrollment, utilization, need for modernization or addition, and attendance patterns...."

Section II, B ("Process"), 1 ("Development of the 15-Year Master Plan") recites that the local superintendent is to apply the same four screening criteria to each school and make recommendations about each school. "In studying and recommending solutions to problems of changing enrollment, the [local] superintendent shall follow guidelines...and directions for implementing change. The guidelines are as follows: ...Apply criteria consistently.... Develop a recommendation for each school...based on the following criteria: [the four screening criteria plus seven additional ones]..."[5/]

5/ JA-18, 19; Complaint, ¶¶ 2.54-2.55, 2.57-2.577. The seven additional criteria are paraphrased in Jeffrey Benson, 2

The local superintendent is then directed to send copies of his preliminary recommendations to the Local Board and to the PTA/PTSA and other school/community organizations within each school's service area for review and comment, to consider the reactions and alternative proposals of said organizations, to develop a recommended final plan and to submit it to the Local Board.6/

Section II,B,2 ("Appeal and Hearing Process"), recites that "Any community that does not support the superintendent's final recommendations affecting its school may...appeal the recommended action and request a hearing before the [Local] Board...."7/

Op. MSBE 650 at 667 (1982) and Argyle Communities United, 2 Op. MSBE 695 at 713 (1982).

6/ JA-20-21; Complaint, ¶¶ 2.56-2.563.

7/ JA-21; Complaint, ¶ 2.564.

In May 1981, the local superintendent issued his preliminary recommendations, in which he recommended the closure of Rock Creek Palisades Elementary School. Members of that community submitted alternatives to the local superintendent, in which they proposed the closure of Pleasant View instead. In August 1981, the local superintendent issued his final recommendations, in which he again recommended the closure of Rock Creek Palisades. The local superintendent has never recommended the closure of Pleasant View. However, in September 1981, the Local Board identified 12 additional closure candidates, including Pleasant View. (Complaint ¶¶ 3.1-4.1)

During the period between November 1981 and May 1982, under the Long Range Policy, after hearings, the Local Board made approximately 40 facilities decisions in which it voted to close about 28

schools. On November 18, 1981, the Local Board voted to close Pleasant View. On January 6, 1982, after a request by the president of the Montgomery County Council, the president of the Local Board purported to state reasons for the closure of Pleasant View. However, the reasons are spurious, and in no case except that of Pleasant View did the Local Board purport to state reasons. (Complaint, ¶¶ 6.1 through 6.2, 8.1 through 8.89)

At all times, PTA has argued that the Long Range Policy contemplates that only the local superintendent can nominate closure candidates, that the Local Board was required to state reasons why it closed the schools it closed and no others, and that by its vote to close Pleasant View, the Local Board acted inconsistently with other facilities actions.

B. Actions by the State Board.

About 20 closed schools, generally by their PTA's, including Petitioner PTA, appealed the Local Board's closure actions to the State Board.[8/] There followed adjudicative type hearings before the State Board hearing examiner, during which hearings the local superintendent and his subordinates purported to state reasons for the Local Board's closure of each school,[9/] exceptions and argument before the State Board, and State Board decisions, including one upholding the closure of Pleasant View, in

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8/ In Re Certain Montgomery County School Closings, 2 Op. MSBE 454 (1982); Complaint, ¶¶ 7.1, 7.4.

9/ See, for example, Lone Oak Elementary School PTA, 2 Op. MSBE 554, 556-558 (1982); Highland Elementary School PTA, 2 Op. MSBE 566, 569-70 (1982); Francis Scott Key Junior High School PTA, 2 Op. MSBE 573, 577-579 (1982); Ruth Abbott, 2 Op. MSBE 582, 606-607 (1982).

which case a voluminous record had been developed.[10/]

The State Board's long held standard of review for school closures is whether the Local Board acted arbitrarily and unreasonably, or illegally.[11/]

As to the Local Board's self-imposed requirement that only the local superintendent can nominate closure candidates, the State Board hearing examiner, whose conclusion was adopted in relevant part by the State Board, said:

> Appellants argue that inasmuch as the Long-Range Educational Facilities Planning Policy does not by its terms [12/]

10/ Complaint, ¶¶ 9.1, 9.7; Radnor Elementary School PTA, 2 Op. MSBE 630, 634 (1982), 14a through 20a.

11/ For example, Radnor Elementary School PTA, supra, at p. 633, 21a.

12/ This is, of course, a mischaracterization of PTA's argument. PTA argued that the Long Range Policy contemplated that the local superintendent, and only he, after engaging in the processes described in the Policy, could nominate closure candidates.

> reserve to the Board the discretion to close schools other than those recommended by the Superintendent, the Board's decisions in the instant cases were violative of its own policy and must be set aside as arbitrary, unreasonable and illegal. I cannot accept this view.
>
> The Board of Education, not the Superintendent, has the responsibility for the effective operation of the County's school system, including, where warranted, the consolidation of schools (Education Article 4-119(a)). It follows that while the Board can delegate authority to the Superintendent to hold hearings, to screen schools for possible closure, and to recommend a course of action to the Board, the Board cannot delegate its ultimate responsibility to make the decisions. It would be an abdication of this responsibility were the board to limit itself to a simple acceptance or rejection of a given recommendation by the Superintendent. 13/

As to the requirement that the Local Board state reasons for its various facilities actions, the State Board hearing examiner, whose conclusion was adopted in relevant part by the State Board, said:

13/ Radnor Elementary School PTA, supra, at pp. 644-645, 21a ff.

> In Bushey Drive Elementary School Parents v. Board of Education of Montgomery County, #76-1, the State Board set forth standards applicable to school closings. Among these standards is that "The general public, including groups opposing the action, shall be given a full explanation of the Board's reason for making its decision." I do not read this to mean that the board's reason must be embodied in its decision, but rather that the record of its action must be such as to allow one to determine whether or not the decision was arbitrary and unreasonable. (Emphasis supplied) 14/

As to the requirement that the Local Board act consistently, the State Board hearing examiner, with the approval of the State Board, developed a variety of doctrines to extinguish this requirement.

In his April 21 decision in Lone Oak Elementary School PTA, 2 Op. MSBE 554, 559 (1982), he said: "One cannot expect identical weighting of the [Local] Board's solution criteria from school to school." In his April 21 decision in the

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14/ Id., at 645-646, inadvertently omitted from appendix.

instant case, 2 Op. MSBE 630, 649 (1982), 25a, he said that PTA "may also be correct that criteria applied here were applied differently elsewhere, but problems differ from area to area and total consistency is neither possible nor desirable."

In the instant case, the State Board in upholding the Local Board's closure of Radnor, rather than Bradley, said, at page 633:

> The second issue in regard to the poor condition of Bradley is whether it made sense for the County Board to decide to renovate Bradley now rather than facing the possibility of a renovation which might have been costlier at Radnor several years from now. See Hearing Examiner's Findings, p. 640. Frankly, in choosing Radnor rather than Bradley for closure, the County Board appears to have acted in a manner which is inconsistent with its decision regarding Hungerford Park Elementary School or Leland Junior High School. 15/ Both of these schools were chosen for closure in great part because of their immediate

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15/ See Radnor Elementary School PTA, supra, at p. 642; Jeffrey Benson, 2 Op. MSBE 650, 652, 664 (1982).

need for costly renovations, and the County Board's desire to avoid such expenses. However, in light of the entire record as discussed above and in the Hearing Examiner's Findings of Fact, this Board cannot conclude it was arbitrary, unreasonable or illegal for the County Board to decide to choose to renovate Bradley now, rather than Radnor a few years hence. (Emphasis supplied.)

It is important to emphasize, as we have consistently held in the past, that a local school system has the right to close and consolidate schools. See § 4-110 of the Education Article of the MD. ANN. CODE. Moreover, in the choice of which schools are to be closed and consolidated, this Board will not substitute its judgment for that of the school board unless the latter's decision is arbitrary, unreasonable or illegal. See Bushey Drive Elementary School Parents v. Board of Education of Montgomery County, No. 76-1, Opinions of MSBE 441, 442 (1976). Such is not the case here.

On June 2, 1982, in Kensington Elementary School PTA, 2 Op. MSBE 671, 681 (1982), the hearing examiner said:

Where a County Board abides by its own regulations and guidelines, I am of the view that one cannot test arbitrariness and unreasonableness by a mathematical count of the Board's solution criteria. Circumstances vary from school to school as to the degree of weight to which each criterion is entitled. So long as there is ade-

> quate reason, supported by at least one criterion, the local board's decision in a school closing case should prevail. In this case the Board honored its procedures and guidelines, and had sufficient justification for its decision to warrant its being upheld.

The State Board adopted the hearing examiner's findings, conclusions and recommendations in their entirety.

Thereafter, in Jeffrey Benson, 2 Op. MSBE 650 (1982), a different hearing examiner attempted to hold the Local Board to its criteria. On July 28, the State Board, reversing the hearing examiner, at 652-653, repeated the language of the hearing examiner in Kensington Elementary, supra, and quoted with approval the following language:

> Many of the things the solution criteria proposed were somewhat of a wash. For example, you improved the enrollment and the capacity utilization, whichever way the consolidation went....

That is, any closure will reduce the number of unused classroom seats, and in-

crease the utilization of the remaining schools. Therefore, any closure will satisfy at least one of the solution criteria. Therefore, any closure will satisfy the State Board's test.

Finally, in the racial balance cases, the State Board, under the same arbitrary and unreasonable, or illegal, standard of review, subjected the Local Board's actions to much stricter scrutiny than it did in other cases. Complaint, ¶¶ 10.21 through 10.25. Compare, Ruth Abbott, 2 Op. MSBE 582, 582-589, 617-625 (1982) with, e.g., Jeffrey Benson, 2 Op. MSBE 650 (1982).

C. Proceedings in the State Courts

PTA filed a timely appeal under Maryland's Administrative Procedure Act in the Circuit Court for Montgomery County, Maryland, and subsequently filed a brief on the merits arguing that the Local Board had failed to comply with its duty

to state reasons, follow its own rules, and act consistently. But that brief remains unread; on November 3, 1982, 27a, pursuant to a demurrer filed by the Local Board, the court dismissed the appeal on the grounds that there was no liberty or property interest in attending a particular school, therefore no constitutional right to a hearing before the State Board, and no statutory right to a hearing, therefore no contested case within the meaning of the State APA, and therefore no judicial review.[16/] Moreover,

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16/ At all times, PTA agreed that there was no right to a hearing, but for a quite different reason, namely, that there was no substantial issue of disputed material adjudicative fact. PTA briefed to the District Court the issue of Migra issue preclusion and neither the District Court nor the Court of Appeals relied on issue preclusion as a basis for their dismissals of the complaint. This issue is not now before the Court.

The Maryland court's decision appears inconsistent with two later decisions, Warwick Corp. v. Dept. of Trans., 61 Md. App. 239, 486 A.2d 224 (1985) (hearing is

despite Maryland Rule 320, now 2-341, which currently reads: "An amendment may seek to change the nature of the action.. .. Amendments shall be freely allowed when justice so permits...."[17], the court denied PTA leave to amend to some other form of action, 37a.

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required by law within meaning of APA when agency is authorized by law to adopt rules and agency in fact adopts rules requiring hearing) and Donocam Assoc. v. Wash. Sub. San. Comm'n, 302 Md. 501, 489 A.2d 26, 32 (1985) (when rights and duties are to be determined at hearing).

This Court has recently concluded that under the federal APA, the parent of the state APA's in general and the Maryland APA in particular, the requirement of hearing was developed independently of the review provision. Florida Power & Light Co. v. Lorion, 105 S.Ct. 1598, 1604 (1985).

17/ In Crowe v. Houseworth, 272 Md. 481, 325 A.2d 592, 595 (1974), the court stated that under Rule 320: "[A]mendments should be freely allowed in order to promote justice, so that cases will be tried on their merits rather than upon the niceties of pleading" (citations omitted).

PTA appealed to Maryland's Court of Special Appeals which, on June 21, 1983, in an unreported decision, affirmed, 38a. PTA then filed a petition for certiorari which the Maryland Court of Appeals, on September 29, 1983, denied, 43a, Complaint, ¶ 11.

D. Proceedings in the Federal Courts

Thereupon, PTA filed the instant case under 42 U.S.C. Sec. 1983, with pendent state claims, in the District of Maryland.

With respect to Pleasant View, the complaint alleges massive inconsistency between the Local Board's treatment of it and the treatment of other schools. More particularly, Rock Creek Palisades will require a renovation in 1988, while Pleasant View will not require a renovation until 1997. Where racial balance issues were not present, as they were in about six closures, the Local Board in at least a dozen cases closed the school, of a

pair, which first required a renovation. Pleasant View was essentially fully air-conditioned, while Rock Creek Palisades was not. Both schools had special education programs, but the one at Rock Creek Palisades was easily portable, but the one at Pleasant View was not. Pleasant View had, shortly before its closure, been specially modified at a cost in excess of $160,000, for its program for deaf students, and was of all the closure candidates the only school specially modified for a special program. The closure of Pleasant View cannot be justified as a saving of public moneys because the closure of Rock Creek Palisades in its stead would have saved the public school system $2.01-2.065 million (Complaint, ¶¶ 8.381 through 8.392, 8.51 through 8.53, 8.56, 8.57, 8.72 through 8.88).

The complaint alleges that the Local Board was required to state reasons for

facilities decisions by reason of its own rule under which it undertook to improve public understanding of the process by which facilities decisions are made, the State Board's rule, the general rules of administrative law, and the due process clause (¶¶ 12.1, 12.13, 12.35, 16.1 through 16.5) and that the reasons supplied for the closure of Pleasant View are spurious (¶ 12.2). The complaint further alleges that the Local Board was required to act consistently by its own rule undertaking consistency, the rule of the State Board requiring the Local Board to follow its own rule, the general rules of administrative procedure requiring an agency to follow its own rule, the administrative law analogue of equal protection, and the due process and equal protection clauses (¶¶ 12.1, 12.12, 12.33, 12.34, 15.1 through 15.5). In addition, the complaint alleges that the Local

Board was required to follow its own rule, namely the one delegating to the local superintendent the sole power to name closure candidates by reason of the State Board's rule requiring the Local Board to follow its own rule, and administrative law and constitutional principles (¶¶ 12.1, 12.11, 12.31, 14.1 through 14.5).

As to the State Board, the complaint alleges that it failed, under its own standard of review, to police the conduct of the Local Board in accord with its own rule (¶¶ 13.11 through 13.4, 13.6). More particularly, as to the State Board's conclusion that the Local Board could not delegate to the local superintendent the power alone to name closure candidates, the complaint alleges that the statement cited, and has, no State Board precedent, that it is inconsistent with the practice of the Maryland county boards of educa-

tion in such circumstances as the discipline of students and teachers, that it departs from the Maryland and general rules on the delegation of authority, that it is an ad hoc justification for the conduct of the Local Board in closing Pleasant View Elementary School, and that it is a denial of equal protection. (Complaint, ¶¶ 9.31 through 9.37) As to the State Board's conclusion that the Local Board was not required to state reasons, the complaint, ¶ 9.52, alleges that the State Board's rule clearly and unambiguously requires the Local Board to furnish a statement or reasons. And as to the State Board's conclusions about consistency, the complaint alleges that the Local Board has never identified any problems varying from area to area; that with the exception of racial balance, a factor not present here, the Local Board has identified one, and only one problem,

namely too many schools, too few students, and better use of revenues than operating existing schools with many empty seats; that the treatment of Pleasant View was inconsistent with the treatment of various schools in the Pleasant View "area"; that inasmuch as at least one criterion (of the 11 mentioned on p. 8-9 hereof) favored the closure of every school, whether identified by the local superintendent or the Local Board, adoption of the evidentiary test in Kensington Elementary School PTA enabled the State Board to sustain the closure of any school, and that the foregoing conduct of the State Board was a wholesale rejection of the requirement of consistency. (Complaint, ¶¶ 9.41 through 9.46, 10.11 through 10.16)

As to the evidentiary rule announced in Kensington Elementary School, 2 Op. MSBE 671, 681 (1982), the complaint al-

leges that the rule was applied sub silentio to the Pleasant View closure, at best makes a mere scintilla of evidence a sufficient basis to justify the closure of any school, and is in fact tantamount to a conclusive presumption that any facilities action of the Local Board would be proper (¶¶ 13.51 through 13.514, 17.1 through 17.4).

The complaint also alleges that in racial balance cases, under the State Board's same arbitrary and unreasonable, or illegal standard of review, the State Board subjected the Local Board to a much stricter level of scrutiny, and did so without explaining why it utilizes one level of scrutiny at one time, and one level at another. (¶¶ 10.21 through 10.25, 13.52 through 13.55)

On October 10, 1984, the district court granted defendants' motion to dismiss, 44a. The court concluded that

Pennhurst State School v. Halderman, 104 S.Ct. 900 (1984) barred the pendent claims against the State Board defendants and, inasmuch as the State partially funds public education in Montgomery County, barred pendent claims against the county defendants as well.[18/]

As to PTA's due process argument, the court found that under Goodrich v. Newport News School Board, 743 F.2d 225 (4th Cir. 1984), a case involving the discharge of a school employee, and its progenitors, "The only constitutional requirement levied on such administrative

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18/ This portion of the opinion is clearly wrong. Holley v. LaVine, 605 F.2d 638 (2nd Cir. 1979), cert. denied 446 U.S. 913 (1980); Travelers Indemnity Co. v. School Board of Dade County, 666 F.2d 505, 506-509 (11th Cir. 1982), cert. denied 459 U.S. 834 (1982); King v. Caesar Rodney School District, 396 F. Supp. 423, 425-426 (D.Del. 1975). Pennhurst did not purport to change the existing rules determining when a suit against a body was in reality a suit against the state, 104 S.Ct. at 908, 920.

bodies...is that the two fundamental elements of procedural due process be observed, viz., notice and an opportunity for hearing....[T]here was compliance with the minimal requirements of due process, in that notice was given and hearings provided..." (51a-52a, emphasis supplied). With respect to PTA's equal protection allegations, the court found that the rational basis standard of review was the applicable standard, that "the complaint itself admits that there was a rational basis for the decision," and that "having considered relevant factors, the administrators' decision at least had a rational basis, i.e., ...it was not wholly lacking in reasoned support." (53a-55a)

In affirming, the court of appeals stated (5a) that, as to PTA's due process claim, PTA has "attempted to distinguish Goodrich but [is] unable to do so"; that,

as to equal protection the complaint showed that the state actors[19/] had considered the relevant factors and that their decision had a rational basis;" (5a) and that, as to the pendent claims, "We affirm the dismissal of this claim but for a different reason. Having dismissed the federal claims, the district court had discretion to dismiss the pendent state claims" (7a). By its reference to "United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) and Sigmon v. Poe, 564 F.2d 1093, 1096 (4th Cir. 1977)," the court clearly indicated that it was relying on the theory that the district court had dismissed before trial.

19/ The phrase is apparently intended to encompass the county actors as well as the state actors.

REASONS FOR GRANTING THE PETITION

A. Importance of This Case

Preliminarily, this case is important because it involves a question created by Pennhurst State School v. Halderman, 104 S.Ct. 900 (1984): What happens to state claims against defendants protected by the Eleventh Amendment where the state court system refuses to consider those claims on their merits? Under Pennhurst, the claims would appear to die. Under such cases as Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983), and Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the claims should live. Here, the issue is of importance to PTA because the administrative law analogues of due process and equal protection are often stricter than the constitutional doctrines.

B. The lower courts' dismissal of PTA's pendent claims against the Local

Board defendants is an astonishing departure from the accepted and usual course of judicial proceedings, and is in conflict with decisions of this Court and of other courts of appeals.

First, as for the courts' conclusion that this case has been "tried," this case is tantamount (except for allegations relating to jurisdiction under 42 U.S.C. § 1983, venue, and the like, and to the introduction of a few documents issued by Montgomery County Public Schools after the administrative proceedings described above) to the review of the conduct of an administrative agency. As the administrative record is already in existence, the fact-finding function of the district court is unnecessary. Florida Power & Light Co. v. Lorion, 105 S.Ct. 1598, 1607 (1985). Thus, it is meaningless and misleading to say, as the lower courts did, that this action was

dismissed before trial, because trial occurred before the State Board of Education and there will be no trial in the District Court.

Second, as trial has already occurred, and inasmuch as PTA's constitutional claims are not insubstantial on their face, the lower courts' refusals to consider PTA's pendent claims are squarely in conflict with this Court's holding in Schmidt v. Oakland Unified School District, 457 U.S. 594 (1982) (it was an abuse of discretion to consider constitutional claims before pendent state claims).

Third, a number of courts of appeal have ruled that when a state claim would be timebarred in state court, the federal district court must, or should, exercise pendent jurisdiction over the state

claims.[20/] Where the state claim would

20/ Fifth Circuit, Pharo v. Smith, 625 F.2d 1226 (1980) (summary judgment for defendants on federal claim; district court should have considered that state limitations period had run in determining whether to consider pendent state claim); Rheaume v. Texas Department of Public Safety, 666 F.2d 925 (1982), cert. denied 458 U.S. 1106 (1982) (full trial held; if state limitations period has run, district court should exercise pendent jurisdiction). Seventh Circuit, O'Brien v. Continental Illinois Nat. Bank & Trust, 593 F.2d 54, 65 (1979) (federal claim dismissed in district court for failure to state a cause of action; pendent state claim should not be foreclosed by passage of time). Eighth Circuit, Kuhn v. Nat. Ass'n of Letter Carriers, Branch 5, 528 F.2d 767, 771, fn. 6 (1976), reversed on other grounds 570 F.2d 757 (1978) (federal claim dismissed after discovery; in determining whether to consider pendent state claim, availability of state forum a factor). Eleventh Circuit, Draper v. Wheelabrator-Frye, Inc., 735 F.2d 414, 417, 428 (1984) (directed verdict on federal claim after 13 days of trial); Garner v. Pearson, 732 F.2d 850, 854 (1984) (summary judgment for plaintiffs on federal claims). D.C. Circuit, Financial General Bankshares v. Metzger, 680 F.2d 768, 774, 778 (1982) (two years of extensive discovery and three-day trial; dismissal of pendent state claims conditioned on defendant's waiver of state statute of limitations and of objections to introduction in state court of evidence developed in district court);

be timebarred, it could be argued that plaintiff was remiss in failing to file timely in state court. Here, through no fault of PTA's own, the state courts refused to consider PTA's state claims on their merits. A fortiori, these other courts of appeals would have instructed the district courts to assert pendent jurisdiction here, and the decision of the Fourth Circuit is squarely in conflict with these decisions.

Fourth, after concluding that the state Administrative Procedure Act conferred no subject-matter jurisdiction, the state courts denied PTA leave to amend to some other form of action, contrary to their usual rule permitting liberal amendment of complaints and without

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U.S. through SBA v. Pena, 731 F.2d 8, 14-16 (1984) (summary judgment for SBA; dismissal of state claim "could" be conditioned on defendants' waiver of statute of limitations).

explaining their departure from their usual rule or any state interest for such a departure. The state courts thereby denied PTA access to the state courts, and a determination of the merits of its state claims, in violation of PTA's First Amendment and due process rights, contrary to such cases as Boddie v. Connecticut, 401 U.S. 371, 377 ff. (1971), Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 744, 752 (concurring opinion), (1983).21/

Fifth, on their own terms, the decisions of the lower courts in this case and in Goodrich conflict squarely with decisions of this Court. Those cases

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21/ The First Amendment and access cases are collected in three 1983 decisions of the Fifth Circuit: Ryland v. Shapiro, 708 F.2d 967, 971 ff.; Doe v. A Corp., 709 F.2d 1043, 1048; and U.S. v. Hylton, 710 F.2d 1106, 1111.

held that plaintiffs were entitled to notice, hearing, and no more. But in Cleveland Board of Education v. Loudermill, 105 S.Ct. 1487, 1485 (1985), this Court said that the discharged tenured school employee was entitled to "an explanation of the employer's evidence." Again, in Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 463 (1981), this Court said that a "state created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right." Even more importantly, the instant case, Goodrich, and Goodrich's cited progenitors all determine what due process requires without performing a Mathews-Eldridge analysis. But in any event, and contrary to the lower courts, the closure of a school is not the same as the discharge of a tenured school employee. PTA has in fact invoked the due process

clause in a novel context. In such circumstances, this court requires a Mathews-Eldridge analysis, Lehr v. Robertson, 463 U.S. 248, 256 (1983). In support of its claim that the Local Board should have stated reasons for all its closure decisions, PTA has performed a detailed Mathews-Eldridge analysis in its petition for rehearing, pp. 8-12; here, it is sufficient to note that a statement of reasons could hardly be oppressive in that about six of the 28 schools were closed for racial balance reasons, and about 12 were closed because they needed renovation before the school to which the students at the closed school were sent. Moreover, when the closed schools appealed to the State Board of Education, the local superintendent and his staff attempted to state reasons for the Local Board's conduct.

Sixth, the Local Board put various procedural protections into the Long Range Policy in order to minimize the risk of closing the wrong schools--i.e., to minimize the risk of erroneous decisions, see Addington v. Texas, 441 U.S. 418, 425 (1979). PTA argued that the procedure actually followed produced erroneous decisions. But the lower courts were required to perform a Mathews-Eldridge analysis to determine whether due process required all, or some, of the required protections, and without regard to the correctness of the actual closing decisions, Carey v. Piphus, 435 U.S. 247 (1978). The lower courts did not do so. But there is another reason why due process, as well as administrative law principles, required the Local Board and State Board to follow their own procedural rules herein. As noted, the complaint alleges that the Local Board's prior

school closing policy conferred vast discretion upon the Local Board to determine what schools to close. The Local Board's Long Range Policy recites that the new policy was adopted, inter alia, to quiet public resistance to school closures, and that before adoption of the policy, the Local Board enlisted the aid of various citizen's groups to study a preliminary plan. From these three statements, and without more, the course of events can easily be reconstructed. The Local Board perceived the need to close an unprecedented number of schools, but also perceived substantial citizen opposition to closures. To quiet the opposition, the Local Board enlisted citizens and citizens' groups to aid in the formulation of a new policy, and placed the new procedural protections in the policy. Thereafter, the Local Board perceived that citizen opposition had sufficiently

abated to make it possible to proceed with the closures. But it is inconceivable that the citizens were satisfied with the creation of a mere piece of paper; what they expected, and were reasonably entitled to expect, was the creation of an actualized process, containing the procedural safeguards, under which the schools were to be closed. And now, PTA has made out detrimental reliance on the procedural protections of the Long Range Policy, and has implicated due process in the Local Board's failure to observe those protections. U.S. v. Caceres, 440 U.S. 741, 752-753 (1979).

Seventh, the lower courts dismissed PTA's equal protection claims on the pleadings, on the stated grounds that the state actors had considered the relevant factors, and their decision as to Pleasant View therefore had a rational basis. Apparently this means that the statement

of reasons provided by the Local Board and the State Board for the closure of Pleasant View would satisfy the rational basis standard under any set of facts PTA could establish. But that proposition is contrary to two recent decisions of this Court, in both of which the fit between the outcomes and the reasons supplied was insufficient to pass muster under the rational basis standard: Plyler v. Doe, 457 U.S. 202, 207 (1982), and Zobel v. Williams, 457 U.S. 55, 61-64 (1982). Since it is impossible to assess the fit between the outcomes (i.e., the school closures) and the reasons supplied without examination of the outcomes, the lower courts could not dismiss the equal protection claims without examination of the administrative record, i.e., the facts, Conley v. Gibson, 355 U.S. 41, 45-46 (1957), and also without regard to the reasons--which the Local Board has

never supplied--for its other school closure actions.

C. The lower court's dismissal of PTA's pendent claims as against the State Board defendants, for the reasons set forth above, departs from the accepted and usual course of judicial proceedings, and is in conflict with decisions of this Court and other courts of appeals. This Court should now accommodate PTA's First Amendment and due process rights with the Eleventh Amendment immunity of the State.

As noted above, the state court system concluded that the Maryland Administrative Procedure Act conferred no subject matter jurisdiction over PTA's state claims, and then, contrary to its usual rule, and without explaining its departure from its usual rule, denied PTA leave to amend to some other form of action. The federal district court found, in substance, that in light of

Pennhurst State School v. Halderman, 104 S.Ct. 900 (1984), the state courts had extinguished PTA's state claims against those of the defendants protected by the State's Eleventh Amendment immunity. The court of appeals' disposition made it unnecessary to consider this issue.

PTA submits that under such access cases as Boddie v. Connecticut, 401 U.S. 371 (1971), Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983), and under Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), PTA enjoys a First Amendment and due process right to have the substantive merits of these claims heard in some forum, more particularly in state court. PTA proposes that the federal district court make findings of fact and that all disputed questions of law be submitted to Maryland's Court of Appeals under Maryland's Certification of Questions of Law Act, Courts Article,

Sec. 12-601 ff. This procedure would accommodate conflicting constitutional rights in that it would avoid the worst vice of the pre-Pennhurst procedure, namely, the intrusion on state sovereignty that occurs when federal courts instruct state agencies as to what state law is, 104 S.Ct. at 911. In the instant case, this procedure is singularly appropriate in that the evidence was developed before the State Board of Education, a state agency, and because none of the defendants, including particularly the State Board defendants, has ever disputed such evidence. The proposed procedure simply takes a powerful tool, the certification procedure, and assigns it a new

function.[22/] Finally, the proposed procedure is appropriate because the interpretation of the Long Range Policy may have to be submitted to the Maryland courts.[23/]

D. Inasmuch as the allegations of the complaint as to the due process and equal protection claims are meritorious, this case should be remanded to the district court for consideration of the evidence.

CONCLUSION

The petition for the writ of certiorari should be granted.

Respectfully submitted,

Wilbur H. Friedman, Jr.
Counsel for Petitioner

October 1985

22/ Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974); Bellotti v. Baird, 428 U.S. 132, 146, 150-151 (1976). See also Harris County Comm'rs Court v. Moore, 420 U.S. 77, 88-89, fn.14 (1975).

23/ Board of Education of Rogers, Arkansas v. McCluskey, 458 U.S. 966 (1982).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 84-2193, 85-1244

PLEASANT VIEW ELEMENTARY SCHOOL PTA, ET AL., APPELLANTS

v.

GROUP 1 DEFENDANTS, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
JOHN R. HARGROVE, DISTRICT JUDGE.
(C/A HAR-83-4258)

Argued: April 4, 1985
Decided: June 6, 1985

Before: PHILLIPS, CHAPMAN and SNEEDEN, Circuit Judges.

CHAPMAN, Circuit Judge: Plaintiffs, the Pleasant View Elementary School PTA and parents of children who attended Pleasant View Elementary School, sued various Maryland State and Montgomery

County officials and former officials because of their actions in closing Pleasant View Elementary School in Montgomery County, Maryland. Plaintiffs alleged that by their actions the defendants denied them their constitutional rights to due process and equal protection, thus violated 42 U.S.C. § 1983, and, in a pendent state claim, violated their rights under Maryland's Administrative Procedures Act. Defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Federal Rule of Civil Procedure 12(b)(6). The district court granted this motion and plaintiffs appealed. We affirm.

In March 1981, due to declining enrollments, the Montgomery County School Board adopted long-range policies to govern school closures. Pursuant to those policies, between November 1981 and May 1982,

the County School Board closed twenty-eight schools in Montgomery County, including Pleasant View Elementary School. The School Board closed Pleasant View against the recommendation of the County Superintendent who had recommended that a different school be closed.

Before closing each school the School Board gave notice of and held public hearings. The School Board voted to close Pleasant View on November 18, 1981. Plaintiffs appealed that decision to the Maryland State Board of Education. A hearing examiner, after a full two day evidentiary hearing in which plaintiffs participated, affirmed the decision of the County Board. After oral argument before the State Board of Education, the State Board adopted the decision of the hearing examiner. Pleasant View was closed on June 30, 1982.

Plaintiffs then appealed the decision of the State Board of Education to the State Circuit Court under Maryland's Administrative Procedures Act, Maryland State Gov't Code Ann. § 10-201 et seq. (1984). The State Circuit Court determined that it did not have subject matter jurisdiction and dismissed the appeal. The Maryland Court of Special Appeals affirmed that decision and the Court of Appeals of Maryland denied certiorari. On December 16, 1983, plaintiffs filed this action in the United States District Court for the District of Maryland. Plaintiffs now appeal from the dismissal of each of their causes of action by the district court.

I

The district court, holding that the defendants had complied with the minimal elements of due process, notice and an opportunity for a hearing, dismissed

plaintiffs' procedural due process claim on the basis of Goodrich v. Newport News School Board, 743 F.2d 225, 227 (4th Cir. 1984). Plaintiffs have attempted to distinguish Goodrich but are unable to do so. We agree with the district court that the defendants provided plaintiffs with the minimal elements of due process and that Goodrich is dispositive of this issue.

II

The district court dismissed plaintiffs' equal protection claim on the ground that the decision of the School Board had a rational basis supported by the record. The district court held that plaintiffs' complaint did not implicate a suspect classification, that the state actors need only show a rational basis for their administrative decision, and that plaintiffs' complaint showed that the state actors had considered the rele-

vant factors and that their decision had a rational basis. Consequently, the district court dismissed this cause of action. We agree with the district court's determination of the level of scrutiny and that the defendant's actions did not deny plaintiffs their right to equal protection. U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 174-75 (1980); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 40-44 (1973).

III

The district court also correctly dismissed plaintiffs' cause of action under 42 U.S.C. § 1983. The district court had dismissed plaintiffs' federal constitutional claims, and § 1983 does not create any substantive rights, it only provides a remedy for the deprivation of constitutional and federal rights. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 616-618 (1979).

IV

Finally, the district court dismissed plaintiffs' pendent state claims because of the eleventh amendment and the Supreme Court's decision in Pennhurst State School v. Halderman, ____U.S. ____, 104 S.Ct. 900 (1984). We affirm the dismissal of this claim but for a different reason. Having dismissed the federal claims, the district court had the discretion to dismiss the pendent state claims. United Mine Workers of America v. Gibbs, 383 U.S. 715, 726; Sigmon v. Poe, 564 F.2d 1093, 1096 (4th Cir. 1977). In this case the district court did not abuse that discretion.

We have fully considered plaintiffs' other arguments and find them to be without merit. For the above stated reasons we affirm the order of the district court. We also affirm the district court's denial of plaintiffs' motion to

supplement the record. We have reviewed plaintiffs' proposed additions to the record but do not find them to be helpful in this appeal.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 84-2193(L), 85-1244

PLEASANT VIEW ELEMENTARY SCHOOL PTA, ET AL, APPELLANTS

v.

GROUP 1 DEFENDANTS, ETC., ET AL., APPELLEES

Decided and Filed July 22, 1985

Upon consideration of the appellants' motion for leave to file the petition out of time,

IT IS ORDERED that the motion is granted.

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Phillips and Judge Sneeden.

For the Court,

/s/John M. Greacen
Clerk

APPENDIX B

RADNOR ELEMENTARY SCHOOL PTA,
SADDLEBROOK ELEMENTARY SCHOOL PTA,
HUNGERFORD PARK ELEMENTARY SCHOOL PTA,
PLEASANT VIEW ELEMENTARY SCHOOL PTA,
Appellants

v.

MONTGOMERY COUNTY BOARD OF EDUCATION,
Appellee

No. 82-29

June 30, 1982

OPINION

We hereby adopt the Findings of Fact, Conclusions of Law and Recommendations of the Hearing Examiner in the above-named appeals for Saddlebrook, Hungerford, and Pleasant View Elementary Schools.

* * *

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS OF THE HEARING EXAMINER

These cases pose the question of whether the Montgomery County Board of Education acted arbitrarily and unreasonably or illegally in ordering the closure

of all or any of the appealing schools. The cases were consolidated for hearing because they all raise the issue of whether Respondent violated its own regulations in calling these schools for closure hearings, despite the Superintendent's recommendations that they remain open. The cases were heard by the undersigned on March 16 and 18, 1982. On the basis of the testimony, exhibits and briefs of the parties, this Examiner makes the following

FINDINGS OF FACT

The Superintendent, in both his preliminary and final recommendations under the County Board's 15-Year Comprehensive Master Plan for Educational Facilities, proposed the retention of the appealing schools and the closure of other elementary schools in nearby neighborhoods. By a majority vote in each case, the County Board proposed considering the appealing

schools as alternates to those recommended for closure by the Superintendent, and the Board then held hearings with respect to each of these schools.

Appellants assert that the course of action followed by Respondent was a violation of the procedures for school closings outlined in Respondent's Long-Range Facilities Planning policy. Appellants presented testimony to the effect that each school had abided by the procedural requirements of that policy and that, after consideration of the evidence, the Superintendent recommended the closing of schools other than Appellants'. Further, Appellants argued that while each school was given an opportunity to be heard by the Board prior to its decision, there were no more than thirty days to prepare testimony. The witnesses on this issue averred that the Long-Range Facilities Planning policy does not give the Board

of Education any option other than to accept or reject a final recommendation by the Superintendent. (Record, 16-85)

Each Appellant called witnesses who dealt with matters unique to his or her school.

* * *

Pleasant View submitted its case on the affidavit of the co-president of its PTA. He asserted that although the Superintendent had recommended the closure of Rock Creek Palisades Elementary School and the retention of Pleasant View, the Board of Education, after a hearing, decided to close Pleasant View instead. He averred that the cost of closing Pleasant View would be much greater than the cost of closing Rock Creek Palisades, that Pleasant View has a worse potential for alternate use than has Rock Creek Palisades, and that closing Pleasant View would result in additional busing costs.

He expressed concern that adequate consideration had not been given to the special program at Pleasant View for hard-of-hearing children and to the placement of those children and their teachers. Although the affiant was present at the hearing, he was not cross-examined. (Pleasant View Affidavits and supplements.)

Respondent's first witness was Superintendent Andrews. He testified initially on the issue raised by all four Appellants regarding the Board's right, under the Long-Range Educational Facilities Planning policy, to close a school other than one recommended by the Superintendent. He stated that he wrote the policy and that there is nothing in it which prevents the Board from adding schools to be considered for closure. He added that the board has an obligation to be responsive to citizen input and to any

possibilities for closure other than those recommended by the Superintendent. Finally, he said that every affected community had an opportunity to react to alternatives to be considered by the Board and that each such community had adequate notice for a hearing. (R., 347-368)

On cross-examination the Superintendent agreed that the Board could have amended the requirements of the Long-Range Educational Facilities Planning policy had it chosen to do so. He agreed that there was no language in the policy which specifically says the Board can add alternate schools for consideration as closure candidates, and he also agreed that the Board has an obligation not to violate its own policies. He stated that with respect to the schools involved in these Appeals, his final recommendations had been that they remain open but that

the Board, after notice and hearing, had concluded that each of them should be closed. He pointed out that substantially in advance of Board action he had sent a memorandum to all school principals advising them that "Board of Education members have been asked to name any other schools they would like to have called to a hearing at the September 8 meeting. Please be alert for any announcement on the eighth that could affect your school." (R., 370-400)

The Superintendent then testified as to each of the closure decisions on Appeal.

* * *

As to Pleasant View, Superintendent Andrews testified that it is in an area of extreme underutilization. He said that he had recommended the closure of five elementary schools in that area and that the Board ultimately decided that

five should be closed. The Board, however, requested an alternate proposal showing the effect of closing Pleasant View instead of Rock Creek Palisades. It held a hearing on that proposal and then chose to close Pleasant View. The Superintendent pointed out that Pleasant View's utilization is very low and that all of the children at Rock Creek Palisades, apart from special education students, can walk to school. He stated that both schools have programs for handicapped children--hearing-impaired at Pleasant View and sight-impaired at Rock Creek Palisades--and that the closure of either school would require a shift in location of its special education program. He indicated that the closure of Pleasant View would mean that the sight-impaired students at Rock Creek Palisades would be able to continue at that barrier-

free school. (R., 429-434; Board's Pleasant View exhibits)

On cross-examination, the Superintendent was asked several questions designed to demonstrate that the application of the Board's closing criteria to Pleasant View was inconsistent with the application of those criteria to other schools in the county. The Superintendent, however, either denied such inconsistencies or accounted for them in terms of conditions unique to the choice between Pleasant View and Rock Creek Palisades. He agreed that the hearing-impaired children at Pleasant View are mainstreamed and that there could be a program loss if the transfer of those children cannot be done in a manner which would continue mainstreaming. He stated that the assignment of the Pleasant View teachers and of the hearing-impaired program had not yet been resolved, but that an effort

would be made to limit program disruptions. (R., 434-451)

Dr. George Fisher, Director of the school system's Department of Educational Facilities Planning, was called as Respondent's final witness, and his testimony was largely in support of that of Superintendent Andrews. He indicated that in the case of each of the appealing schools there were competing criteria to be considered and that the Board's final judgment on those criteria differed from that of the Superintendent.

* * *

CONCLUSIONS OF LAW

In my Findings and Conclusions in the combined appeals involving Blair High School et al, which I am forwarding this day, I have summarized some of the more significant holdings of the State Board in school closing cases. The State Board has consistently held that it will not

substitute its judgment for that of a local board on the question of whether a given school should be closed or have its boundaries altered. In such a case the decision of a local board will be permitted to stand unless shown to be arbitrary and unreasonable or illegal.

The Board of Education's Long-Range Education Facilities Planning policy details the procedures to be followed by the Superintendent in arriving at his recommendations as to school closures and consolidations. This policy provides in part that "The Superintendent and the Board are to ensure that local school communities have an opportunity to react to and/or develop alternative proposals before any decisions are made that affect their schools and their children."

Appellants argue that inasmuch as the Long-Range Educational Facilities Planning policy does not by its terms reserve

to the Board the discretion to close schools other than those recommended by the Superintendent, the Board's decisions in the instant cases were violative of its own policy and must be set aside as arbitrary, unreasonable and illegal. I cannot accept this view.

The Board of Education, not the Superintendent, has the responsibility for the effective operation of the County's school system, including, where warranted, the consolidation of schools (Education Article 4-119(a)). It follows that while the Board can delegate authority to the Superintendent to hold hearings, to screen schools for possible closure, and to recommend a course of action to the Board, the Board cannot delegate its ultimate responsibility to make the decisions. It would be an abdication of this responsibility were the board to limit itself to

given recommendation by the Superintendent.

In these cases, unlike Blair and Eastern, for example, the Board did give affected school communities an opportunity to "react to...alternative proposals" prior to its decisions. Some two months before its closure actions the Board advised school communities of the identity of alternates it would be considering, and each such alternate was given 30 days to prepare for a hearing. The four schools in the instant Appeals were all aware of the arguments made by the schools which had suggested them as alternates, and they had ample time to prepare for their appearances before the Board. None of these schools can properly claim surprise, lack of due process, or prejudice to rights. I accordingly conclude that Respondent's decisions in

ure of the Long-Range Educational Facilities Planning policy to spell out the authority of the Board to close schools other than those recommended by the Superintendent.

Turning to the merits of each school's Appeal, I conclude, for the reasons set forth below, that the Board's decision to close Radnor should be reversed but that its decisions to close Saddlebrook, Hungerford Park and Pleasant View should be upheld.

* * *

Pleasant View

The decision regarding this school is in a sense comparable to that regarding Saddlebrook. The choice to be made was a difficult one, and the Superintendent came down on one side and the Board the other. Whatever merit there may have been to the Superintendent's recommendation, I cannot find that the Board's

decision was so arbitrary and unreasonable as to warrant reversal.

Appellants may be correct in their assertion that it will be more costly to close Pleasant View than to close Rock Creek Palisades, but there are other considerations to be taken into account: I find it understandable, for example, that sight-impaired students should be kept at their present school, particularly since that school--Rock Creek Palisades--is barrier-free. There is the additional factor that all of the children at Rock Creek Palisades, other than the handicapped, can walk to school.

Appellants may also be correct that the criteria applied here were applied differently elsewhere, but problems differ from area to area and total consistency is neither possible nor desirable.

The most serious problem with respect to the closing of Pleasant View is the

placement of the hearing-impaired children who have had the benefit of mainstreaming with teachers especially prepared to deal with their handicap. The Superintendent has given his assurance that every effort will be made to place the program for these children in a manner which will cause minimum disruption. Presumably parents with an interest in that program will be made aware of their rights of appeal if they feel that their children are being deprived of a satisfactory educational environment.

Because there is nothing in the record of the Pleasant View Appeal which indicates that Respondent acted arbitrarily and unreasonably or illegally, I conclude that its decision should be upheld.

Mitchell J. Cooper, Hearing Examiner

April 21, 1982

APPENDIX C

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

PLEASANT VIEW PTA, et al., Appellants	:	
vs.	:	Law No. 61290
MARYLAND STATE BOARD OF EDUCATION, et al., Appellees	:	

OPINION AND ORDER

INTRODUCTION

On June 30, 1982, the Maryland State Board of Education rendered a decision designated Opinion No. 82-29 upholding a decision of the Montgomery County Board of Education closing Pleasant View Elementary School located on Upton Drive in Kensington, Montgomery County, Maryland.

On July 6, 1982, the present petitioners/appellants Pleasant View Elementary School PTA, Myra Freer, and Wilbur H. Friedman, filed in this court a notice of appeal, an order for appeal, and a petition appealing the State Board decision.

On August 5, 1982, the Montgomery County Board of Education filed a demurrer to the petition on appeal asserting that there is no statutory or other authority for an appeal to this court from a decision of the State Board or the County Board to close a particular school and that petitioners have no standing to appeal in any event. The matter now before this court is the disposition of that demurrer.

FACTUAL BACKGROUND

On December 14, 1981, the Pleasant View Elementary School PTA requested a review by the Maryland State Board of Education of a decision by the Montgomery County Board of Education to consolidate and close the Pleasant View Elementary School. The Board of Education of Montgomery County had decided to close the school pursuant to its statutory authority to determine public school boundary

lines and to consolidate or close schools within the County. Md. Educ. Code Ann. §§ 4-101, 4-108, 4-119 (1978). The State Board of Education accepted review of the matter pursuant to the implied visitorial powers contained in § 2-205 of the Education Article, Annotated Code of Maryland. These have been constantly held to authorize the State Board to review education decisions and actions of local boards. See Zeitschel v. Board of Education of Carroll County, 274, Md. 69, 79-80, 332 A.2d 906, 912 (1975).

The case of the Pleasant View Elementary School PTA was consolidated with petitions for review filed by three other Montgomery County elementary school PTA's for the purpose of taking testimony. On April 21, 1982, the State Board Hearing Examiner issued his Findings and Conclusions, with the recommendation that the County Board's decision to close Pleasant

View Elementary, be upheld and on June 30, in Opinion No. 82-29, the State Board followed the recommendation of the Hearing Examiner. This appeal ensued.

DISCUSSION

As indicated above, the appellees have demurred on two grounds: (1) that the court has no subject matter jurisdiction over this matter; and (2) that the Pleasant View PTA, as well as the individual appellants, have failed to allege any basis upon which they have standing to bring this action.

SUBJECT MATTER JURISDICTION

The petitioner asks this court to assume appellate jurisdiction pursuant to the Maryland Administrative Procedure Act. The Act provides for the judicial review of actions of a State agency where there has been a final decision in a "contested case." Md. Ann. Code., Art. 41, § 255(a) (1978). Sec. 244(d) of Art.

41, defines a "contested case" as "...a proceeding before an agency in which the legal rights, duties, statutory entitlements or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." (Emphasis added).

It is respondents' contention that the case at bar is not a "contested case" because there is neither a statutory nor a constitutional right, duty, or privilege involved, nor does one exist under case law.

With respect to any constitutional right, duty, or privilege, the respondents correctly cite to Welch v. Board of Education, 477 F. Supp. 957 (D.Md. 1979), for the proposition that there is no liberty interest, no property interest, and no right or privilege to attend a particular school. In that case the court stated at page 966:

> "Plaintiffs seemingly claim under Md. Educ. Code Ann., Section 2-205(g)(3) that before any school is closed or converted, they have a constitutional procedural due process right to have the members of the State and County Boards of Education hear in person from all 'interested citizens' who wish to speak before or with them. The resolution of Plaintiffs' said contention initially depends upon whether a resident of a school district possesses a liberty or property interest in a school in its district remaining 'as is'. Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 546 (1972). Obviously, Plaintiffs possess no such liberty interest. Nor do they have a property interest unless it is granted to them under State law."

Thus, on a purely constitutional basis, there exists no "contested case" within the definition of Art. 41, § 255(a) and, consequently, no right to judicial review under the Maryland Administrative Procedure Act.

Whether there exists a "contested case" under some statutory provision, however, presents a more difficult issue. The respondents argue that because the State Board of Education has no statutory

obligation to hold a hearing prior to making its decision, there can be no statutory right under the APA to have its decision reviewed by this court simply because that agency has chosen to hold a hearing.

Petitioners argue that since the State Board did in fact conduct a hearing at which evidence was presented on contested issues, then regardless of whether or not a statutory right to such a hearing existed, the matter becomes a "contested case" within the meaning of the APA, thus, conferring a right of appeal under provision of that law. No Maryland case law was cited by petitioner to support this view. However, the court's own research turned up the case of Prince George's County v. Blumberg, 288 Md. 275, 294, 296 (1980) which, at first blush, appears to support petitioner's argument.

Closer examination, however, discloses a fundamental difference in the two cases. In Blumberg, property or personal rights may well have been affected by the action of the Washington Suburban Sanitary Commission revocation of Blumberg's water and sewer permits. In the present case, no personal, liberty, or property rights of petitioners can be affected because no such rights exist in the retention "as is" of any particular school. Welch v. Board of Education, supra. Therefore the hearings before the State Board are not subject to appeal to this court under the provisions of the APA. A further impediment to an appeal may well be contained in Md. Educ. Code Ann. § 2-205(e)(3) providing that a decision of the Board involving a controversy under the provisions of the article within its jurisdiction is final. The effect of this statute need not be resolved in this case for the rea-

sons stated above that an appeal does not lie in any event.

Whether or not review by way of an independent court suit is available to petitioners is not before the court and no opinion is expressed herein on that issue. For the reasons above stated this court finds that it has no jurisdiction to entertain an appeal under the provisions of the APA from the ruling of the State Board of Education which is the subject of the present proceeding. This ruling is consistent not only with the requirements of the APA and with the case law, but also with the B rules of the Maryland Rules of Procedure governing administrative appeals.

STANDING

The respondents have also demurred on the basis that the Pleasant View PTA lacks the standing necessary to bring this suit. To overcome the standing

issue, the petitioning association must demonstrate that it has a property interest of its own, "separate and distinct from that of its individual members, which may be affected by any of the alleged acts under attack." Citizens P. & H. Ass'n. v. County Exec., 273 Md. 333, 345, 329 A.2d 681 (1974), citing Md. Naturopathic Ass'n. v. Kloman, 191 Md. 626, 630, 62A.2d 538 (1948). This principle has been applied to a variety of situations. Bar Assoc. v. District Title Co.. 224 Md. 474, 168 A.2d 395 (1961); Beckett v. Housing Authority, 198 Md. 71, 81 A.2d 215 (1951); Crider v. Cullen, 191 Md. 723, 63 A.2d 618 (1949); Dvorine v. Castelberg Jewelry Corp., 170 Md. 661, 185 A. 562 (1936). The petitioning association has made no allegation remotely suggesting that it possesses any interest that is separate and distinct from its

members; nor can this court conceive of any such interest that might exist.

The issue of whether the allegations of the petition to appeal are sufficient to withstand an attack by demurrer as regards the individual appellants need not be reached, since the court holds there is no right to appeal in any event.

Accordingly, based upon the memoranda of law submitted by the parties and oral argument of counsel, it is this 1st day of November, 1982, by the Circuit Court for Montgomery County, Maryland

ORDERED that respondents' demurrer be and it is hereby sustained, without leave to amend, and judgment is entered for the respondent for costs.

/s/Philip M. Fairbanks
Philip M. Fairbanks,
Judge of the Circuit
Court for Montgomery
County, Maryland

Filed: November 3, 1982

APPENDIX D

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1606

September Term, 1982

PLEASANT VIEW PTA ET AL.

v.

MARYLAND STATE BOARD OF
EDUCATION ET AL.

Gilbert, C.J.
Moylan
Alpert,

JJ.

PER CURIAM

Filed: June 21, 1983

Pleasant View Elementary School PTA, Myra Freer and Wilbur H. Friedman have appealed from an order of the Circuit Court for Montgomery County. That order sustained, without leave to amend, a demurrer filed by the Maryland State

Board of Education. The hearing court (Fairbanks, J.) held, inter alia, that Pleasant View PTA, an unincorporated association, lacked standing to maintain its suit. Judge Fairbanks also ruled that in any event there was no "right to appeal" from the State Board's action since the matter of the closing of a school is not a "contested case" within the ambit of the Maryland Administration Procedure Act. Md. Ann. Code art. 41, §§ 244-256A.

On appeal to this Court the appellants have adopted two unusual procedures. They have filed a "supplemental appendix" and, in addition, have incorporated a "second supplemental appendix" in a reply brief.

We are unaware of any rule of procedure that permits the filing of a supplemental appendix, much less a second supplemental appendix. Md. Rule 1028 a

directs the printing of "an appendix" or "printed record extract." Significantly, the rule does not allude to appendices or extracts. The appellants' self-conferred privilege of printing "supplemental" and "second supplemental" appendices is sufficient in and of itself to permit dismissal of the appeal.

Additionally, as Judge Fairbanks noted in his opinion, Pleasant View PTA lacks standing to pursue the appeal. Pleasant View is simply not a proper party to the suit. If the appeal is to be maintained at all, the standing must be based on Freer's and Friedman's rights, if any, in the matter.

We observe that Freer and Friedman sought to become party litigants, but their request seems to have been ignored formally even though they appear to have been treated by Judge Fairbanks as par-

ties. Inasmuch as he seems to have so treated them, so shall we.

This case arose out of a decision by the Montgomery County board of Education to close the Pleasant View Elementary School. The decision to close that school met with strong opposition on the part of its PTA. The PTA appealed to the Maryland State Board of Education which affirmed the Montgomery County board of Education. The PTA then appealed to the Circuit Court for Montgomery County.

Judge Fairbanks pointed out that the Maryland Administrative Procedure Act provides for appeals in a "contested case." Md. Ann. Code art. 41, § 255 (a). A "contested case" is a proceeding before an agency in which legal rights, duties and statutory entitlements, as well as privileges, are determined. No such rights, duties, statutory entitlements, or privileges were decided or determined

by the Maryland State Board of Education. Hence, the matter before us is not a "contested case" within the meaning of the Act. Md. Ann. Code art. 41, § 244(d). Thus, if the instant case is not "contested," it is not appealable. If it is not appealable, the appellants have no standing and the matter must be dismissed.

Contrary to the appellants' point of view, they were not left without a remedy. Other, procedurally proper, means of redress were available to the appellants, but they were not pursued.

Judge Fairbanks correctly sustained without leave to amend the appellees' demurrer. The Circuit Court was without jurisdiction to entertain the appeal. So too are we.

APPEAL DISMISSED.

COSTS TO BE PAID BY APPELLANTS.

APPENDIX E

PLEASANT VIEW ELEMENTARY SCHOOL PTA, ET AL.	:	In the Court of Appeals of Maryland
v.	:	Petition Docket No. 308
MARYLAND STATE BOARD OF EDUCATION, ET AL.	:	September Term, 1983
	:	(No. 1606, September Term, 1983, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: September 29, 1983

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PLEASANT VIEW ELEMENTARY SCHOOL PTA, ET AL.,	:	
vs	:	CIVIL NO. HAR 83-4258
GROUP 1 DEFENDANTS, ET AL.	:	

MEMORANDUM

I.

This case was commenced by a complaint filed December 12, 1983, in which the PTA of a recently-closed elementary school in Montgomery County, Maryland, as well as the parents of two former students of that school, raised a number of challenges, based both on State law and the federal Constitution, to the action of the County School Board in closing the school, the action of the State Board of Education in affirming the closure, and the action of officials of Montgomery

County in being willing to take over the school property after closure. The school has, because of legal proceedings challenging its closure, been vacant for years, and it is beginning to become useless through the effects of vandalism and decay. The case is presently before the Court on the defendants' motions to dismiss, which have been fully briefed on both sides and as to which argument was held on October 5, 1984. The case is before me for disposition, pursuant to 28 U.S.C. § 636(c), with consent of the parties, and on the reference of Judge Hargrove.

In that the facts are not in dispute and the case presents issues of law only, the motions to dismiss would appear to be dispositive of the case, if they have merit. Upon consideration, it is my opinion that the motions to dismiss are meritorious, and that the complaint

should be dismissed for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6).

II.

A.

The plaintiffs complain that the various boards of education and other defendants ignored certain provisions of Maryland law, including the Maryland Declaration of Rights, Maryland statutory law pertaining to educational matters, regulations of the State and County boards of education, and the "common law governing the conduct of administrative agencies" during the long decisional process that resulted in the eventual closure of Pleasant View.

It is clear from the Supreme Court's decision in Pennhurst State School v. Halderman, 52 U.S.L.W. 4155 (U.S., Jan. 23, 1984) that the Eleventh Amendment bars the exercise of federal pendent

jurisdiction to adjudicate state law claims against state officials, 52 U.S.L.W. at 4162, as well as against city, county, or other municipal officials where the expenditure of state funds could be required in implementing the relief ordered by the federal court, even if retrospective damages are not awarded. 52 U.S.L.W. at 4164. In this Court's opinion, Pennhurst is dispositive, without question, as to the state law claims asserted against the defendants denominated herein as Group 4 defendants and Group 5 defendants, who are, as present and former members of the Maryland State Board of Education, state officials against whom the Eleventh Amendment bars even the declaratory and injunctive relief on state law claims sought in this complaint.

With regard to the Group 1, Group 2, and Group 3 defendants, all of whom are

present or former members of the Montgomery County Board of Education or present and former county legislative or executive officials of that County, I am also of the opinion that Pennhurst bars pendent adjudication of the state law claims asserted. I am of this opinion because, if the relief sought here were to be granted by the Court, in particular the relief sought at page 31 of the complaint in ¶¶ 3 and 4 (reopening the school), the expenditure of state funds would necessarily be involved, in that schools in this state are funded by a combination of state and local funding. See MD. EDUC. CODE ANN. § 5-202 (1978). Furthermore, the other declaratory and injunctive relief sought by the plaintiffs, viz., reconsideration of the decision by the State Board and further proceedings thereon, would also necessarily involve the expenditure of state

resources in the conduct of further administrative proceedings. Consequently, and in view of the rule laid down in Pennhurst, 52 U.S.L.W. at 4164, I conclude that, under the circumstances of this case, the plaintiffs, if successful, would be awarded relief on their state law claims that would violate the Eleventh Amendment. Therefore, I am of the opinion that the Eleventh Amendment, as interpreted in Pennhurst, bars the state law claims raised against all of the defendants.

B.

Plaintiffs argued at the October 5 hearing that their state law claims should be certified to the Court of Appeals of Maryland, a procedure which would somehow reduce this Court's role to a "ministerial" one, thereby avoiding Pennhurst's effect. Even if such a result were possible, certification is out

of the question in this case, because the plaintiffs' claims have already been presented to the Maryland appellate courts, which have established a firm rule that school closing decisions are simply non-justiciable. See, e.g., Bernstein v. Board of Education of Prince George's County, 245 Md. 464, 476 (1966). Therefore, it would be pointless to accept the plaintiffs' suggestion that the state law issues be certified to the Court of Appeals of Maryland. In any event, as discussed above, the rule in Pennhurst bars this Court from granting relief with respect to those claims, whether certified or not, as a matter of constitutional principle under the Eleventh Amendment.

III.

A.

Plaintiffs also raise a number of federal constitutional claims. The first

set is alleged in the complaint at ¶¶ 12.2-13.52. These are in the nature of procedural due process allegations, to the effect that the County and State boards failed to follow their own regulations in several regards during the administrative proceedings that led to the closure of Pleasant View. The Fourteenth Amendment was allegedly violated thereby.

As the United States Court of Appeals for the Fourth Circuit has recently made clear, the failure of State or local officials to follow their own regulations in the conduct of administrative proceedings does not itself violate the federal Constitution. Goodrich v. Newport News School Board, ___ F.2d ___, No. 83-1740 (4th Cir. Sept. 13, 1984), slip. op. at 4. The only constitutional requirement levied upon such administrative bodies, assuming that the plaintiff has a protected liberty or property interest in

the matter before that body, is that the two fundamental elements of procedural due process be observed, viz., notice and the opportunity for a hearing. Id. See also Atencio v. Board of Education of Penasco Independent School District, 658 F.2d. 774 (10th Cir. 1981).

It is highly doubtful whether the individual plaintiffs even had a protected liberty or property interest under Maryland law in having Pleasant View School remain open, at least in their capacities as individual citizens of Montgomery County and/or parents of school-age children. See Welch v. Board of Education of Baltimore County, 477 F. Supp. 959, 966-69 (D.Md. 1979). Assuming, arguendo, that the plaintiffs have some constitutionally protected liberty or property interest, it is still clear from the undisputed record in this case that there was compliance with the minimal elements

of due process, in that notice was given and hearings provided, all along the line of administrative proceedings. Consequently, plaintiffs have not stated an actionable claim of violation of the procedural due process requirements of the Fourteenth Amendment. Goodrich v. Newport News, slip. op. at 4-5.

B.

With regard to the matter of equal protection under the Fourteenth Amendment, it is clear that, in the absence of a suspect classification such as one implicating racial discrimination, all that the state actor must show is a rational basis for the administrative decision. Welch v. Board of Education, 477 F. Supp. at 964-65. In the present case, the complaint specifically disavows the existence of any racial implications in the administrative decision under challenge. Complaint at ¶ 9.42. Having

reviewed the pleadings and motions in this case, and having heard oral argument, I am convinced that there is no sustainable claim that the administrative decision lacked a rational basis. That minimal constitutional requirement is satisfied by certain facts stated as allegations in the plaintiffs' very complaint, for example, the recitations at ¶ 9.61 to the effect that there was an evaluation of considerations involving special programs, lack of barriers, and busing, that militated in favor of some schools against the others. The complaint itself shows that these were among the factors considered by the state decision-makers. In effect, the complaint itself admits that there was a rational basis for the decision, although the plaintiffs obviously disagree with the result that was reached, as well as the process by which it was reached. None-

theless, they cannot fairly dispute that, having considered relevant factors, the administrators' decision at least had a rational basis, i.e., that it was not wholly lacking in reasoned support. Welch v. Board of Education, 447 F. Supp. at 965.

C.

To the extent that the complaint can be read as alleging a deprivation of plaintiffs' substantive due process rights, it is clear that no cause of action therefor is stated. Certainly, none of the defendants' actions amounted to "inherently impermissible" conduct. See State of North Carolina in relationship with Grier v. Board of Commissioners for Moore County, et al., ___ F.2d ___, No. 83-2229 (4th Cir. Sept. 27, 1984).

D.

For the reasons stated, the plaintiffs have failed to state any cognizable claim

of violation of the federal Constitution, thus depriving this Court of jurisdiction over their constitutional complaint under 42 U.S.C. § 1983. Likewise, they have failed to state any claim of violation of federal statute, see Maine v. Thiboutot, 448 U.S. 1 (1980), and their complaint thus totally fails under 42 U.S.C. § 1983. Finally, having foresworn (complaint at ¶ 9.42) any racial aspect at all to this case, the plaintiffs have failed to state a claim under 42 U.S.C. § 1981. See, e.g., Greene v. Johns Hopkins University, 469 F. Supp. 187, 193 (D.Md. 1979).

In short, the plaintiffs, having lost their case in the administrative forum provided by the State, and also having realized that, under State law, that loss was final, have sought the intervention and interposition of this Court in a matter of entirely local concern. For reasons of both constitutional and pru-

dential concerns, as stated hereinabove, this Court has no warrant to inject itself into that dispute.

IV.

An order will be entered separately in accordance with this Memorandum Opinion, granting the motion of all defendants to dismiss the complaint, and dismissing the same for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6).

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States Magistrate

Dated: October 10, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PLEASANT VIEW ELEMENTARY SCHOOL PTA, ET AL., :

vs : CIVIL NO. HAR 83-4258

GROUP 1 DEFENDANTS, ET AL. :

ORDER

For the reasons stated in the foregoing Memorandum, IT IS, this 10th day of October, 1984, by the Court, ORDERED:

1. That the motions to dismiss filed on behalf of all defendants BE, and the same hereby ARE, GRANTED;

2. That plaintiffs' complaint BE, and the same hereby IS, DISMISSED, for failure to state a claim upon which relief can be granted; and

3. That the Clerk of Court mail copies of the foregoing Memorandum and of this Order to counsel for the parties.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States Magistrate

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PLEASANT VIEW ELEMENTARY SCHOOL PTA, ET AL., :

vs : CIVIL NO. HAR 83-4258

GROUP 1 DEFENDANTS, ET AL. :

MEMORANDUM AND ORDER

Presently pending in this case is the plaintiffs' motion for emergency relief pending appeal. No oral hearing is necessary on the motion. Local Rule 6, D.Md.

The Court, on October 10, 1984 issued a detailed memorandum opinion, in which it was concluded that the plaintiffs' complaint should be dismissed for failure to state a claim upon which relief can be granted. Among other things, the Court noted that the plaintiffs had stated no meritorious federal constitutional claim,

and that their state law claims were barred by the Eleventh Amendment or were otherwise non-justiciable. The Court also declined to retain jurisdiction of the case, while certifying the state law questions to the Court of Appeals of Maryland.

The main thrust of the plaintiffs' present motion appears to be that the Court should have retained pendent jurisdiction over the state law claims and should have certified them to the Court of Appeals of Maryland. Once again, it must be pointed out that, under the Eleventh Amendment, pendent jurisdiction cannot be exercised by this Court on state law claims in a Section 1983 suit. Pennhurst State School v. Halderman, 52 U.S.L.W. 4155 (U.S., Jan. 23 1984). Even if Pennhurst did not apply, this Court would still not exercise pendent juris-

diction over the state law claims once the federal claims were determined not to have merit. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). As United Mine Workers makes clear, even where a federal court has the constitutional power to adjudicate pendent state claims, prudential concerns dictate that the court not exercise such power when the federal claims are dismissed before trial. 383 U.S. at 726. In this case, as noted above, Pennhurst deprives this Court of the constitutional power to adjudicate plaintiffs' state law claims in the first place. Thus, under Pennhurst and United Mine Workers, this case should be dismissed in its entirety.

For the reasons stated, the plaintiffs are not entitled to any temporary or emergency relief or any other relief pending appeal. Therefore, their motion must BE, and the same hereby IS, DENIED.

SO ORDERED, this 26th day of October, 1984.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States Magistrate

Supreme Court, U.S.
FILED
NOV 21
JOSEPH F. SPANIOL
CLERK

No. 85-665

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PLEASANT VIEW ELEMENTARY SCHOOL PTA, AND MYRA FREER AND WILBUR H. FRIEDMAN, JR.,
Petitioners,

v.

GROUP I DEFENDANTS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 85-665

In The
Supreme Court of the United States

October Term, 1985

PLEASANT VIEW ELEMENTARY SCHOOL PTA,
and
MYRA FREER and WILBUR H. FRIEDMAN, JR.
Petitioners

v.

GROUP I DEFENDANTS, ET AL.
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Does the closing of Pleasant View Elementary School violate the procedural

due process and equal protection requirements of the Fourteenth Amendment and 42 U.S.C. §1983?

2. After finding Petitioners' constitutional claims meritless, did the district court have the discretion not to exercise jurisdiction over the pendent State claims?

3. Was certification of the State law claims to the Court of Appeals of Maryland necessary in light of the fact that in Maryland courts have determined that school closing decisions are not justiciable?

STATEMENT OF THE CASE

Introduction

This case arose from the decision of the Board of Education of Montgomery County ("County Board") on December 18, 1981 to close the Pleasant View Elementary School. Thereafter, Petitioners ("PTA") and Wilbur Friedman[1/] embarked on a multi-

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[1/]Although Petitioner characterizes itself as (cont'd)

faceted administrative and judicial attack to overturn the school closing. The school was closed on June 30, 1982. App. A at 38.[2/] It has remained vacant and is becoming useless through vandalism and decay. App. F at 45a.

Because of declining enrollment and underutilization of school facilities, in March, 1981 the County Board adopted a long-range policy to govern school closings. App. A at 2a-3a. Those policies instructed the County Superintendent to gather data and publish preliminary recommendations for boundary modifications for school consolidations and closures. These preliminary recommendations were distributed for comment to various individuals and groups within the community. Complaint at p. 9. The County Superintendent then presented his final

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the Pleasant View Elementary School PTA, that entity has long since dissolved and there is no indication that the community or the PTA is aware of or has lent its support to this court action.

[2/]All references to Appendices are to those of the Petition for Writ of Certiorari unless otherwise stated.

recommendations to the County Board. Id. The Superintendent, in both his preliminary and final recommendations, proposed the retention of the Pleasant View Elementary School and the closure of other elementary schools in nearby neighborhoods. App. B at 12a. However, by a majority vote in each case, the County Board proposed the closure of Pleasant View Elementary School as an alternative to closing another elementary school in the area. The County Board held hearings with respect to each of these schools. App. B at 12a-13a. Representatives of Pleasant View Elementary School appeared at a public hearing before the County Board. App. A at 3a. On November 18, 1981, after the community had been given an opportunity to participate in a public hearing, the County Board voted to close Pleasant View Elementary School. Id.

Administrative Proceedings

PTA then filed a timely appeal to the Maryland State Board of Education ("State Board"). App. A at 3a. PTA participated in a two-day full evidentiary hearing be-

fore the State Board Hearing Examiner. Id. After the hearing, the Hearing Examiner, in a detailed opinion stating findings of fact and conclusions of law, recommended that the State Board affirm the decision of the County Board. Id. The State Board upheld its Hearing Examiner's recommendations in a written opinion issued on June 30, 1982. Id.

State Judicial Proceedings

On July 6, 1982 PTA filed an Order of Appeal in the Circuit Court for Montgomery County, Maryland, pursuant to the State Administrative Procedure Act, MD. ANN. CODE, Md. State Gov't. Code Ann. §§10-101--10-405 (1984). The circuit court issued an Opinion and Order on November 3, 1982, finding no constitutional or statutory basis for the appeal. The County Board's demurrer was sustained without leave to amend. App. C at 26(a)-37(a). In an unreported opinion, the Court of Special Appeals of Maryland affirmed the Circuit Court's decision. App. D at 38(a)-42(a). The Maryland Court of Appeals denied PTA's request for a writ of certiorari on September 29, 1983. App.

E at 43(a). On March 10, 1984, PTA filed a Motion for Reconsideration in the Maryland Court of Appeals requesting that court to vacate its 1983 denial of the petition for certiorari. That motion, which was denied, once more urged review of the State Board's decision under the State Administrative Procedure Act.[3/]

Proceedings in the District Court

This case was filed in the United States District Court for the District of Maryland on December 12, 1983 and assigned to a Magistrate for final disposition pur-

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[3/] On Oct. 31, 1985 PTA filed an action in State court against the Hon. Judge Philip M. Fairbanks and the Hon. Judge David L. Cahoon of the Circuit Court of Montgomery County. Pleasant View Elementary School PTA v. Fairbanks, et al., Civil Action No. 10544. The case, a civil rights action, alleges that Judge Fairbanks, by denying Plaintiffs' leave to amend their original complaint, denied them the right to access to the State courts, to due process, and to equal protection. The complaint requests Judge Cahoon, the administrative judge, to reassign the case to Judge Fairbanks who is now retired. PTA has requested the Maryland courts to stay this new State court proceeding pending disposition of the Supreme Court's consideration of the petition for certiorari.

suant to 28 U.S.C. §636(c). In an Opinion dated October 10, 1984, Magistrate Frederic N. Smalkin granted the Respondent's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). App. F at 44(a)-58(a); App. G at 59(a)-62(a).

The essence of PTA's complaint before the district court was that the State and County Boards of Education had ignored certain provisions of Maryland law, including the Maryland Declaration of Rights, Maryland statutory law pertaining to educational matters, the regulations of the State and County Boards of Education, and the "common law governing the conduct of administrative agencies." App. F at 47(6). As to these State claims, the district court found that the Eleventh Amendment as interpreted by this Court in Pennhurst State School & Hosp. v. Halderman, ___ U.S. ___, 104 S.Ct. 900 (1984), barred the exercise of federal pendent jurisdiction. App. F at 46(a)-49(a). Further, in a supplemental Memorandum and Order, the district court

concluded that even if Pennhurst did not apply, it would still not exercise pendent jurisdiction over the State law claims as it had determined the federal claims did not have merit. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). App. G at 61(a). In response to PTA's argument that the State law claims should be certified to the Court of Appeals of Maryland, the district court found it would be "pointless" to certify these issues as the Maryland appellate courts have established "a firm rule that school closing decisions are simply not justiciable." App. F at 50(a).

The district court also found there was no merit to PTA's federal constitutional claims. It held that the allegations that State or local officials failed to follow their own regulations in the conduct of administrative proceedings did not itself violate the federal constitution. In addition, it found that even if PTA had a protected liberty or property interest under Maryland law in having the Pleasant View Elementary School remain

open, it was clear that notice was given and hearings provided "all along the line of administrative proceedings." App. G at 52(a)-53(a). In regard to the equal protection claim, the court found that PTA's complaint specifically disavowed the existence of any racial implications and showed that the State and county officials had considered relevant factors, and therefore their decision had a rational basis. Having failed to state any cognizable claim of violation of the federal constitution, the court found it lacked jurisdiction under 42 U.S.C. §1983. The court concluded that "Plaintiffs, having lost their case in the administrative forum provided by the State, and also having realized that, under State law, that loss was final, have sought the intervention and interposition of this Court in a matter of entirely local concern." App. G at 56(a).

Proceedings in the Court of Appeals

After a final appeal was considered on full briefs and argument, the Court of Appeals for the Fourth Circuit affirmed

the dismissal on June 6, 1985, and a Petition for Rehearing was denied on July 22, 1985. The Court of Appeals affirmed the district court opinion. However, it did not rule on the dismissal of the pendent State claims under the Eleventh Amendment. Rather, it upheld the district court's discretionary decision to dismiss the pendent State claims under United Mine Workers of America v. Gibbs, 383 U.S. at 726. App. A at 7(a).

REASONS FOR DENYING CERTIORARI

I.

The Lower Courts Correctly Held That The State And Local Boards Did Not Violate The Equal Protection And Procedural Due Process Requirements Of The Fourteenth Amendment In The Closing Of Pleasant View Elementary School.

A. There was no violation of the procedural due process requirements of the Fourteenth Amendment in the closing of Pleasant View Elementary School.

The entire basis of PTA's argument is that the State and County Boards breached their constitutional duty to follow their

own rules, state reasons, and act consistently in the closing of Pleasant View Elementary School.[4/] Brief at pp. 24-25. The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). Property interests are not created by the Constitution; rather they are created by State law. Board of Regents v. Roth, 408 U.S. at 577. The district court was correct that "[i]t is highly doubtful" that PTA "had a protected liberty or property interest

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[4/] PTA admitted before the lower court that the County Board's long-range policy did not have the effect of law and conceded, "We not pause to consider the interesting issue of whether the local board regulations, on a sub-delegation theory, also have the force of law." Plaintiffs' Opposition to Defendants' Motion to Dismiss, Docket No. 13, at p. 3. Further, although it is true that the State Board has the authority to adopt bylaws, rules and regulations having the force and effect of law (Section 2-205(c) of the Education Article of the Maryland Annotated Code), in this instance the resolutions in question have never been published and adopted as bylaws.

under Maryland law in having Pleasant View Elementary School remain open,...." App. F. at 52(a). See also, Cleveland Bd. of Educ. v. Loudermill, __ U.S. ___, ___, 105 S.Ct. 1487, 1491 (1985); Paul v. Davis, 424 U.S. 693, 709 (1976).

In Maryland, a county board of education has the statutory discretion to "establish a public school if, in its judgment, it is advisable" and the statutory responsibility to consolidate schools, if it considers such consolidation practicable. MD. EDUC. CODE ANN. §§4-108 and 4-119 (1985). Based on these provisions of State law, the Maryland Court of Appeals has held "[a]bsent a claim of deprivation of equal educational opportunity or unconstitutional discrimination because of race or religion, there is no right or privilege to attend a particular school." Bernstein v. Bd. of Educ. of Prince George's Co., 245 Md. 464, 472, 226 A.2d 243, 248 (1967); see also, Elprin v. Howard Co. Bd. of Educ., 57 Md. App. 458, 464, 470 A.2d 833, 836 (1984). Further, United States District Court

decisions for the district of Maryland that have considered school closings have unanimously held that no property interest exists. Tsay, et al. v. Montgomery County Board of Education, et al., No. HM-83-1852 (D.Md. July 13, 1983); Welch v. Board of Education of Baltimore County, 477 F. Supp. 959 (D.Md. 1979).

Nor has a liberty interest been implicated by the closing of the Pleasant View Elementary School. By closing the school, Petitioners have alleged no imposition of physical restraint, cause or damage to personal reputation or good name, or interference with the ability of any individual to pursue any of the fundamental human endeavors that might be encompassed within the meaning of the term "liberty." Board of Regents v. Roth, 408 U.S. at 572-574.

In any event, both the Court of Appeals and the district court found that PTA was given the minimal elements of due process and that notice and hearings were provided throughout the administrative proceedings. Before the County Board's

decision to close Pleasant View Elementary School, Appellants were given a hearing. Additionally, they were given the right to appeal the County Board's decision to the State Board, and there were given a full evidentiary hearing before a State Hearing Examiner. Further, they had an opportunity for oral argument before the State Board. App. A. at 5(a); App. F at 52(a)-53(a).

"When the minimal due process requirements of notice and hearing have been met, a claim that an agency's policies or regulations have not been adhered to does not sustain an action for redress of procedural due process violations." Goodrich v. Newport News School Board, 743 F.2d 225, 227 (4th Cir. 1984). See also Atencio v. the Board of Education of Penasco Independent School District, 658 F.2d 774 (10th Cir. 1981); Bates v. Sponberg, 547 F.2d 325 (6th Cir. 1976). As this Court has held:

> §1983 does not extend the right to relitigate in federal court... the proper construction of school regulations. The system of public education that has evolved in this Nation relies

> necessarily upon the discretion and judgment of school administrators and school board members and §1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees. Wood v. Strickland, 420 U.S. 308, 326 (1975). See also Board of Educ. of Rogers, Arkansas v. McCluskey, 458 U.S. 966, (1982).

Thus, assuming arguendo that PTA had some constitutionally protected liberty or property interest, it is clear from the record that they were given the minimum elements of due process, and their claims that the agencies did not follow their own rules and regulations do not rise to the level of constitutional deprivation.

B. There was no violation of the Equal Protection Clause of the Fourteenth Amendment in the closing of Pleasant View Elementary School.

PTA has never clearly explained its equal protection claim. However, it has specifically disavowed the existence of any racial implications in the administrative decision under challenge or any other suspect classification or fundamental right. Complaint at ¶9.42. App. F at 53(a). Both lower courts found that as

PTA's complaint did not implicate a suspect class or fundamental right or allege the denial of an education to any child or the deprivation or impingement of the sensitive classes -- gender, alienage, or illegitimacy -- the rational basis test was applicable. Under this test, both courts found that the State and County Boards had considered the relevant factors involved in the school closing, i.e., special programs, lack of barriers, and busing, and that there was a rational basis for their decision to close Pleasant View. App. A at 5(a)-6(a); App. F at 53(a)-55(a). PTA failed its burden under the rational basis test to convince the courts that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." Vance v. Bradley, 440 U.S. 93, 111 (1979); see, Minnesota v. Cloverleaf Creamery, 449 U.S. 456, 464 (1981).

C. PTA failed to state a claim under 42 U.S.C. §1983.

PTA asserted jurisdiction for its

alleged constitutional claims under the Civil Rights Act of 1871, 42 U.S.C. §1983. However, as both lower courts found, §1983 is remedial in nature and provides no substantive rights in itself. Rather, it merely provides a jurisdictional remedy for the deprivation of constitutional and federal rights. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 616-618 (1979). PTA has not asserted that the closing of Pleasant View Elementary School violated any federal statutory rights. Therefore, to the extent it invokes §1983 for jurisdictional purposes to vindicate what it asserts are claims created by the U.S. Constitution, those claims must fail.

II.

The Lower Courts Were Correct To Dismiss The Pendent State Claims.

The district court dismissed PTA's pendent State claims because of the Eleventh Amendment as interpreted under this Court's decision in Pennhurst State School & Hosp. v. Halderman, ___ U.S. ___,

104 S.Ct. 900 (1984). Further, it found that even if Pennhurst did not apply, it would not exercise pendent jurisdiction over the State law claims because it had determined the federal claims did not have merit. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). The Court of Appeals affirmed the dismissal of the State law claims for this reason, finding that having dismissed the federal claims, the district court had the discretion to dismiss the pendent claims. App. A at 7(a); App. G at 61(a). As this Court held in United Mine Workers v. Gibbs, "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." 383 U.S. at 726. "Its justification lies in consideration of judicial economy, convenience and fairness to litigants." Id. Decisions of State law should be avoided as a matter of comity, and "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the State claims should be dismissed as well." Id. As the Court of Appeals held, "[h]aving dismissed the federal claims, the district court had the discretion to

dismiss the pendent State claims." App. A at 7(a).

PTA cites numerous cases which it claims stand for the proposition that if a State claim would be time-barred in State court, "the federal district court must, or should, exercise pendent jurisdiction over the State claims." Brief at pp. 34-35. These cases are clearly irrelevant as PTA's claims were not time-barred and have already been brought to the attention of Maryland's Court of Appeals. As PTA states, "[t]he State courts refuse to consider PTA's State claims on their merits." Brief at p. 36. What PTA desires is a federal court order that Maryland's courts reconsider PTA's claims. PTA also argues that it "is meaningless and misleading to say, as the lower courts did, that this action was dismissed before trial, because trial occurred before the State Board of Education and there will be no trial in the district court." Brief at pp. 33-34. PTA apparently is seeking to have the evidentiary hearing before the State Hearing

Examiner characterized as a trial before district court. This is a frivolous argument.

III.

Certification Of The State Law Claims To The Court of Appeals Of Maryland Is Unnecessary Since As Maryland Appellate Courts Have Established School Closing Decisions Are Nonjusticiable.

The primary relief PTA seeks is to have all disputed questions of law submitted to the Maryland Court of Appeals. Brief at pp. 45-46. However, PTA has already lost its case in both the administrative and judicial forums provided by Maryland. In addition, as Magistrate Smalkin found, certification is "pointless" because Maryland courts have ruled that school closing decisions are nonjusticiable. Board of County School Commissioners of Caroline County v. Morris, 123 Md. 398, 91 A.718 (1914). See also Bernstein v. Bd. of Educ., 245 Md. at 472, 226 A.2d at 248; Elprin v. Howard Co. Bd. of Educ., 57 Md. App. at 466-467, 470 A.2d at 836-837.

Morris involved a challenge to a county board's decision to consolidate and close schools. In discussing the State Board's visitatorial and exclusive powers to resolve disputes of this nature with finality, the court held that:

> [W]hen the controversy or dispute is one involving the proper administration of the public school system of the State, the Court has no power to interfere, and that all such questions must be referred to and finally settled by the Board of Education.

Morris, 123 Md. at 403.

The Morris decision found that the "State Board which is charged with the duty of explaining the 'true intent and meaning of the law' has the full power to advise the School Board with respect to the proposed consolidation and to correct any erroneous action it may take." Morris, 123 Md. at 404. It observed that the statutes under which the State school system is organized "have provided the mode and agency for settling all such questions as this without resort to the court." Id.

CONCLUSION

For three and a half years, the facility that once housed the Pleasant View Elementary School has remained vacant while Petitioner Wilbur Friedman has carried on a one-man battle to reopen the school. Under the most liberal interpretation, PTA's action is devoid of any meritorious constitutional claims. It was given notice and hearings before the County Board prior to the decision to close the school. A two-day evidentiary hearing was held before the State Hearing Examiner, and oral argument before the State Board itself. Clearly, PTA was afforded the required elements of notice and hearing under the Due Process Clause. In addition, in its own complaint, it has acknowledged reasons that would support a rational basis for the County Board's decision to close the Pleasant View Elementary School. Its entire claim is that the State and County Boards did not follow their own rules and regulations in the closing of the school. However, these assertions are

ones of State law. Even if the federal court had constitutional power under the Eleventh Amendment to consider these pendent State claims, it also had the discretion to dismiss those claims having found there was no merit to PTA's federal constitutional claims.

It is time for this lengthy and costly judicial journey to end. Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 85-665

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PLEASANT VIEW ELEMENTARY SCHOOL PTA,

PETITIONER

v.

GROUP 1 DEFENDANTS

PETITIONER S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

PLEASANT VIEW ELEMENTARY SCHOOL PTA,

Petitioner

v.

GROUP 1 DEFENDANTS

Pleasant View Elementary School PTA, by counsel, hereby submits this brief in reply to the opposition to the petition for certiorari filed by the Respondent Boards of Education, hereinafter called the Boards.

1. The Boards' statements, pp. 2-3, fn. 1 and p. 22 of its brief, that PTA has dissolved, and that the community does not support this action, are not supported by the record, are false, and are irrelevant.

2. The Boards' statement, p. 11, fn. 4, that the State Board regulation was never published or adopted as a bylaw is a denial of par. 1.21 of the complaint herein, JA-59 in the court of appeals, which asserts that the regulation was both adopted and published.

3. The Boards' argument, pp. 10-13, that PTA lacks a constitutionally protected interest in the closure of Pleasant View Elementary School is wrong.

PTA understands that the court of appeals, by its finding that this case is indistinguishable from Goodrich v. Newport News School Board, 743 F.2d 225 (4th Cir. 1984), to have found that the rules of the State Board and the Local Board

conferred on PTA a constitutionally protected interest, namely one of the same kind and degree that other state rules confer on tenured school employees. And of course it is federal, rather than state, law which determines the existence of such an interest.

4. The Boards' statement, p. 15, that PTA has never explained its equal protection claim, is flatly false.

PTA contents itself with a single example: As alleged in par. 8.2 of the complaint, JA-65-66 below, one purported reason for the closure of Pleasant View school was that Pleasant View had barriers to certain handicapped children, namely thosein wheelchairs, while the school to which the Pleasant View children were sent

did not. However, (1) Montgomery County Public Schools has spent very little money making elementary schools accessible to children in wheelchairs; (2) the Local Board voted in 1981 to close eight barrier free schools and, contrary to the recommendation of the local superintendent, not to close eight schools which are not barrier free; (3) the cost of making Pleasant View barrier free was minimal, either $12,000 or $57,000, and was not ascertained until long after the Local Board voted to close Pleasant View; and (4) Pleasant View had, in 1980, been specially modified at a cost in excess of $160,000, to accommodate another kind of handicapped child, namely deaf children, and was of all the closure

candidates the only one specially modified for a special program. (Complaint, par. 8.31 ff., JA-67 ff. below)

5. The Boards' suggestion, pp. 20-21, that school closures are not justiciable under state law is wrong, because this case involves issues of law rather than issues of educational administration.

Respectfully submitted,

Wilbur H. Friedman, Jr.
Counsel for Petitioner